ON HOW THE DEBATE ABOUT WHAT IS LAW SHOULD PROCEED IN THE FACE OF THE METHODOLOGY CONFLICT IN JURISPRUDENCE

A Thesis

by

GREGORY MICHAEL BERGERON

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

May 2008

Major Subject: Philosophy

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ABSTRACT

On How the Debate about What Is Law Should Proceed in the
Face of the Methodology Conflict in Jurisprudence. (May 2008)
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This thesis focuses on the contemporary literature in Anglo-American analytic jurisprudence that takes answering the question "what is law?" as the primary goal. Agreement about what is law—that is, agreement about which theory of law is accurate and adequate—is necessary to achieve the primary goal. Theorists have come to acknowledge that no such agreement exists due to their disagreements over two subjects: (S1) what is law and (S2) what methodology theorists should follow to produce an accurate and adequate theory of law. I refer to theorists' disagreement about S2 as the methodology conflict. Today, theorists advance towards the primary goal in two different directions: directly or indirectly. The direct course labors to accomplish agreement about which theory of law is accurate and adequate. The indirect course toils to accomplish agreement about which methodology a theory of law should satisfy to be accurate and adequate, before advancing to the direct course. If one course is the correct or best way to achieve the primary goal, it is imprudent for theorists to continue to work towards the same goal in separate directions. How, then, should theorists proceed? Answering this question, loosely put, is the main objective of this thesis.

I argue that theorists must resolve the methodology conflict first to be able to achieve the primary goal of jurisprudence (i.e., to reach a common answer to the question "what is law?"). I reveal that the methodology conflict poses a serious problem for theorists working to reach an agreement about S1: namely, theorists cannot agree about which legal theory is accurate and adequate unless they agree about which methodology a legal theory should satisfy to be accurate and adequate. Next, I settle the methodology conflict. I show that a particular synthesis of the current two approaches to resolve theorists' disagreement about S2 —imperialism and relativism—provides a way out of the methodology conflict. I explain that the solution to the methodology conflict is a reasonable four-step examination process that enables theorists to engage in meaningful debate about S1 and S2 and work more successfully towards achieving the primary goal.

To my parents and Neen

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I. INTRODUCTION: THE PROBLEM

This thesis focuses on the contemporary literature in Anglo-American analytic jurisprudence that takes answering the question "what is law?" as *the primary goal*. The basic subject of jurisprudence is *the law* as a complex set of social phenomena that pertain to governance of human conduct in a community. The basic task of jurisprudence is to provide an enlightening account of the law that is accurate and adequate.[1] Traditionally, offering an account of the law involves generating a set of propositions about the law, which explains numerous issues concerning legal and related phenomena (e.g., law's defining features, law's authority, the connection between law and morality, and the adjudication of law by legal officials) in a manner that furthers our understanding of what the law is. Theorists usually call such an account *a theory of law*.[2] To achieve the primary goal, agreement about which legal theory is an accurate and adequate account of the law is necessary. To be sure, such agreement is tantamount to agreement about what the law is, that is, a common answer to the question "what is law?". Currently, no such agreement exists among theorists.

This thesis follows the style of *The Chicago Manual of Style*, 15th Edition.

[1] I deliberately state the task (and the subject) of jurisprudence in basic terms here to subsume theorists' methodological differences between their alternative accounts of the law. In addition, I want to acknowledge that theorists disagree as to whether the account of the law—which is the goal of this basic enterprise—(a) must be one complete account that furthers our understanding of what the law is in a particular manner or (b) can and should be multiple partial accounts that further our understanding of what the law is in diverse ways. In this thesis, I discuss these differences and disagreements at length in Section II and Section III. Hereafter, I use the terms "jurisprudence," "philosophy of law," "legal philosophy," and "legal theory" interchangeably to refer to this basic enterprise. However, to be clear, this basic enterprise is one particular area of jurisprudence. Jurisprudence has other areas that investigate the law. For example, the investigations into particular types of law: such as, criminal law, civil law, commercial law, and tort law.

[2] Hereafter, I use the terms "a theory of law" (or "theories of law"), "a legal theory" (or "legal theories"), and "a theory" (or "theories") synonymously to refer to such an account.

Achieving agreement about which legal theory furthers our understanding of what the law is accurately and adequately is a difficult enterprise given the current state of affairs in jurisprudence. In *Concept of Law*, perhaps the cornerstone of contemporary legal philosophy, H.L.A. Hart writes: "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'."[3] Hart's summary of the situation in jurisprudence was true of the literature before *Concept of Law*, which was published in 1961. Today, nearly fifty years later, it is true of the literature after *Concept of Law*. Hart,[4] Joseph Raz,[5] John Finnis,[6] Ronald Dworkin,[7] and other theorists all appear to offer legal theories that answer the question "what is law?" in seemingly diverse, strange, and even paradoxical ways.

For example, Hart, Raz, Finnis, Dworkin, and other theorists explain the connection between law and morality differently. Hart and Raz claim that the connection between law and morality is contingent (i.e., the law is neither necessarily immoral nor moral).

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[3] Hart, *Concept of Law*, 1. As evidence of this jurisprudential state of affairs, Hart quotes central theses of his recent predecessors' legal theories: "'What officials do about disputes is… the law itself' (Llewellyn, *Bramble Bush*, 9); 'The prophecies of what the courts will do in fact… are what I mean by the law' (Holmes, *Collected Legal Papers*, 173); Statues are 'sources of Law… not parts of the Law itself' (Gray, *Nature and Sources of Law*, Section 276); 'Constitutional law is positive morality merely' (Austin, *Province of Jurisprudence Determined*, 259); 'One shall not steal; if somebody steals he shall be punished. … If at all existent, the first norm is contained in the second norm which is the only genuine norm…. Law is the primary norm which stipulates the sanction' (Kelsen, *General Theory of Law and State*, 61)." (Hart, *Concept of Law*, 1-2.)

[4] Hart, *Concept of Law*.

[5] Raz, *Practical Reason and Norms*; Raz, *Authority of Law*; and Raz, *Ethics in the Public Domain*.

[6] Finnis, *Natural Law and Natural Rights*.

[7] Dworkin, *Law's Empire*.

Conversely, Finnis, Dworkin, and Robert Wolff[8] claim that the connection between law and morality is not contingent (i.e., the law is either necessarily immoral or moral). Moreover, although Finnis, Dworkin, and Wolff agree that the connection between law and morality is not contingent, they disagree about whether law is necessarily immoral or moral. Wolff claims the law is necessarily immoral, whereas Finnis and Dworkin claim that the law is necessarily moral. Thus, Hart, Raz, Finnis, Dworkin, and Wolff each offer apparently rival and incompatible propositions about the law concerning its connection with morality.

However, theorists' disagreement about the primary subject—(S1) what the law is—only partly explains why their legal theories are seemingly diverse, strange, and even paradoxical answers to the question "what is law?". In an article entitled "The Problem about the Nature of Law," Raz writes: "The inability of philosophers to agree on a common answer [to the question 'what is law?'] is partly due to differences in their perception of the nature of the problems involved in the question. Such differences reflect themselves in differing unstated assumptions and unconscious starting-points chosen in answering the philosophical questions concerned."[9] Today, Hart, Raz, Finnis, Dworkin, and most other theorists acknowledge that theorists offer different legal theories because they disagree about a second subject: (S2) what methodology should theorists follow to generate a legal theory that provides an accurate and adequate account of the law.[10]

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[8] Wolff, *In Defense of Anarchy*.

[9] Raz, *Ethics in the Public Domain*, 195 (brackets added).

[10] See Bix, *Jurisprudence*; Coleman, *Practice of Principle*, Part III; Coleman, "Methodology"; Dickson, "Methodology in Jurisprudence"; Giudice, "Understanding Diversity"; Hart, *Concept of Law*, Postscript; Leiter, "Beyond the Hart/Dworkin Debate"; Perry, "Interpretation and Methodology in Legal Theory"; Perry, "Hart's Methodological Positivism"; Postema, "Jurisprudence as Practical Philosophy"; Raz, "Two Views of the Nature of the Theory of Law"; and Simmonds, "Bringing the Outside In."

Theorists' disagreement about S2, which I also call *the methodology conflict*, is the result of two factors regarding methodology in jurisprudence. The first factor (F1) is that theorists endorse different methodologies to follow. The second factor (F2) is that theorists respond to the different methodologies that they endorse with opposing approaches, which I call *imperialism* and *relativism*. F1 and F2 explain the complex character of the methodology conflict: namely, while every theorist believes his legal theory should satisfy the methodology he endorses, not every theorist believes all legal theories should satisfy the methodology he endorses. An uncertainty about which methodology a legal theory should satisfy to provide an accurate and adequate account of the law exists among theorists in the face of the methodology conflict, which could remain unresolved for some time without a serious collective effort from theorists.

Unfortunately, in recent jurisprudential literature, theorists appear to differ as to how they should proceed to achieve the primary goal in the face of the methodology conflict. Some theorists proceed towards the primary goal directly: viz., they work to reach agreement about which legal theory is accurate and adequate, without resolving theorists' disagreement about S2. Other theorists proceed towards the primary goal indirectly: viz., they work to reach agreement about which methodology a legal theory should satisfy to be accurate and adequate, before resolving theorists' disagreement about S1. Advancing in separate directions towards the same goal seems imprudent for theorists to continue if one is the correct or best way to achieve the primary goal. How, then, should theorists proceed? Answering this question, loosely put, is the main objective of this thesis.

I will argue that theorists should resolve their disagreement about S2 before their disagreement about S1 because theorists are able to move successfully towards achieving agreement about S1 only if they agree about S2 in advance. I divide the argument for this claim into four sections. To start, I clarify the first factor and the second factor of the methodology conflict in Section II and Section III, respectively. In Section IV, I explain why theorists should resolve their disagreement about S2 first. I show that the methodology conflict creates a serious problem for theorists working to reach an agreement about S1: namely, theorists cannot agree about which legal theory is accurate and adequate unless they agree about which methodology a legal theory should satisfy to be accurate and adequate. In Section V, I explain how theorists should resolve their disagreement about S2. I offer a synthesis of imperialism and relativism—one that combines their strengths and eliminates their weaknesses—as a solution to the methodology conflict.

II. THE FIRST FACTOR OF THE METHODOLOGY CONFLICT

In this section, I explain only theorists' commitments to follow different methodologies. Theorists' endorsement of different methodologies is the first factor of their disagreement about S2 because their response to the different methodologies with rival approaches, which I explain in Section III, fully develops the complex character of the methodology conflict. F2, that is, presupposes F1. In Section II.A, I give a general description of two important topics in F1: (1) what a methodology is and (2) what endorsing and following a methodology involves. Then, in Section II.B, I show that theorists indeed endorse different methodologies to follow with numerous examples of their methodological disagreements.

A. A Methodology

Hart, Raz, Finnis, Dworkin, and other theorists each accepts a conception of what can and should be jurisprudence's fundamental subject, project, and approach to produce an account of the law that furthers our understanding of what the law is. Most theorists have come to call such a conception *a methodology*. A theorist's methodology includes the theorist's guidelines or commitments concerning various issues surrounding the investigation into the law: e.g., the parameters of the analysis, the type of perspective that informs the analysis, and the method of the analysis. (In Section II.B, I will clarify and exemplify the kinds of methodological guidelines that concern the various issues mentioned above.) A theorist's methodological guidelines frame jurisprudence's basic subject and enterprise (which I described at the start of Section I) into a narrowly conceived subject, project, and approach, which the theorist believes should be followed to generate a set of

propositions about the law that provides an enlightening account. To put in formal terms, a theorist's methodology is the set of guidelines that the theorist believes should be followed successfully when generating a set of propositions about the law in order to produce an accurate and adequate account of the law. Accordingly, when generating a set of propositions about the law, a theorist attempts to follow only the set of methodological guidelines that the theorist accepts.

For example, consider a guideline from Raz's methodology. The task of Raz's legal theory, narrowly construed, is to provide an explanation of the nature of law.[11] While Raz's expression "the nature of law" roughly follows the ordinary definition of the word "nature"—viz., "the basic or inherent features of something, esp. when seen as characteristic of it"[12]—Raz intends a specific sort of philosophical meaning for "the nature of law." "A theory consists of necessary truths," writes Raz, "for only necessary truths about the law reveal the nature of the law."[13] For Raz, "the nature of law" refers only to a set of necessarily true properties of the law, which combine to explain the law's fundamental character, or what is necessary for the law to exist (or be what the law is) in a community. According to Raz, a property of the law—say X—is a necessarily true property of the law *if and only if* X is "universal"[14] *and* "essential"[15] to the law. X being universal *and* essential to

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[11] Raz, "Can There Be a Theory of Law," 324.

[12] *Oxford American College Dictionary* (*OACD*), s.v. "nature."

[13] Raz, "Can There Be a Theory of Law," 328.

[14] A property of law—say X—is *universal* if X is applicable to all cases of law wherever and whenever law is found to exist in a community. Raz's use of "universal" roughly follows the ordinary meaning of "universal," i.e. "applicable to all cases." (*OACD*, s.v. "universal.") However, Raz appears to amend the expression "wherever and whenever" to that definition as a universal qualifier for location and time. The universal qualifier "wherever and whenever" eliminates any properties of law that are inapplicable to all cases of law at all locations (l_1, …, l_n) or all times (t_1, …, t_n). For example, if X is present at l_1 from t_1 to t_n, and if X is not present at l_2 from t_1 to t_n, then X is

the law is a necessary and sufficient condition for X to be a necessarily true property of the law: that is, X is a necessarily true property of the law if X is universal *and* essential to the law, but X is not a necessarily true property of the law if X is not universal *or* essential to the law.

Raz, then, accepts the following methodological guideline: a set of propositions about the nature of law should identify only necessarily true properties of the law. Raz believes that only propositions about universal and essential properties of the law—rather than particular and accidental properties of the law—are necessary to explain the nature of law accurately and adequately. Raz believes that only necessarily true properties of the law reveal the nature of law.[16] Thus, for Raz, theorists should satisfy this methodological guideline to generate a set of propositions about the law that produces an accurate and adequate account of the nature of law. For instance, one of Raz's propositions about the

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not necessarily true of law. Alternatively, if X is present at l_1 from t_1 to t_2, and if X is present at l_2 from t_3 to t_4, then X is not necessarily true of law. However, a property of law could be applicable to all cases of law at all locations (l_1, …, l_n) and all times (t_1, …, t_n), for Raz, and still not be a necessarily true property of law. A universal property of law—say X—is not itself sufficient to be a necessary truth about law, since X is not an essential property of law.

[15] A property of law—say X—is *essential* if law would not exist (or not be what law is) in a community without X. The ordinary meaning of "essential" is "absolutely necessary; extremely important." (*OACD*, s.v. "essential.") Thus, an essential property of law—say X—can be taken to be extremely important property of law, even though X is not absolutely necessary for the identity of law, that is, even though the law will not cease being in existence or being what law is without X. Instead, law will undergo a radical change. (Raz, "Can There Be a Theory of Law," 329.) Raz believes this difference between an "absolutely necessary" property and an "extremely important" property is significant in philosophical investigation. For this reason, Raz uses "essential" in the philosophical sense of the word "essence," as an adjective to describe "a property or group of properties of something without which it would not exist or be what it is" (*OACD*, s.v. "essence.") Thus, if a property of law—say X—is not essential, the property is not necessary for law to exist or to be what law is, then X is significant, non-essential, or accidental, which can change over time, while law remains to exist in the same fundamental character. An essential property of law is not itself sufficient to be a necessary truth about law, since an essential property does not necessarily presuppose a particular or a universal application to cases of the law.

[16] Raz, "Can There Be a Theory of Law," 328.

nature of law is that the law claims to possess (but does not necessarily possess) legitimate authority.[17] When generating this proposition about the law, Raz attempts to establish that the law's claim to possess legitimate authority is a universal and essential property of the law, namely a property that is necessary for the law to exist (or be what the law is) in a community. Raz attempts to satisfy at least this one methodological guideline—that is, his commitment to identify only necessarily true properties of the law—when generating all his propositions about the nature of law.

Moreover, a theorist's belief that a theorist *should* follow a methodological guideline entails a belief that a theorist *can* follow the methodological guideline. A theorist believes that a methodological guideline *can be* followed *in the sense that* it is theoretically possible for the theorist to generate a set of propositions about the law that follows the methodological guideline successfully. That a theorist can follow a methodological guideline is a precondition for the claim that a theorist should follow the methodological guideline to be a meaningful requirement. For example, Raz believes that generating a set of propositions that identifies only necessarily true properties of the law is theoretically possible. Raz's methodological guideline requires that the law—as a complex set of social phenomena that pertain to governance of human conduct in a community—*could* possess *some* universal and essential properties wherever and whenever the law is found in our world. However, Raz's methodological guideline does not require that the law *does* possess *some* universal and essential properties because the law *could* possess *only* particular and accidental characteristics wherever and whenever the law is found in our world. Thus, for

[17] See Raz, *Ethics in the Public Domain*, 210-237.

Raz, a theorist *can* establish that the law possesses either *some* or *no* necessarily true properties in an analysis of the law.[18] Thus, whether a theorist (1) can and (2) should follow a methodological guideline are each a potential point for disagreement between theorists. However, to be clear, theorists' normative methodological disagreements are the primary interest of this thesis.

B. Different Methodologies

While theorists in jurisprudence agree about what a methodology is in a general and definitional sense, they disagree about what methodology theorists should follow. Hart, Raz, Finnis, Dworkin, and other theorists believe different sets of methodological guidelines should be followed. In other words, those theorists attempt to follow successfully different methodologies when generating a set of propositions about the law. I provide below examples of theorists' disagreements concerning four kinds of methodological guidelines, which are characteristic of the methodologies accepted by Hart, Raz, Finnis, and Dworkin, as evidence of theorists' disagreements about S2. I call those four types of methodological guidelines *analysis-methods*, *starting-points*, *participant-perspectives*, and *checking-points*. I illustrate that Hart, Raz, Finnis, and Dworkin believe theorists should follow different methodological guidelines in each of those four categories.

[18] Thus, for Raz, a theorist attempts to follow this methodological guideline whether the theorist generates a set of propositions about the nature of law that establishes that the law possesses *some* or *no* necessarily true properties. To be sure, for Raz, if a theorist establishes that the law possesses no necessarily true properties, then an accurate and adequate account of the nature of law shows that the law possesses no fundamental character: viz., that no properties are necessary for the law to exist (or be what the law is) in a community.

To be sure, I am not suggesting that theorists disagree about all methodological guidelines. Theorists' diverse methodologies can and do share some similar methodological guidelines with each other. Presumably, for example, most theorists would agree to follow a rule of non-contradiction as a methodological guideline when generating a set of propositions about the law—viz., that the propositions about the law in a set should not contradict each other—in order to produce an accurate and adequate account of what the law is.

Analysis-Methods

One example is theorists' methodological disagreements about what *analysis-method*(*s*) theorists should follow to generate a set of propositions about the law that produces an accurate and adequate account of what the law is. An analysis-method is a particular form of procedure for approaching or accomplishing an investigation of the law, which is the object or subject of the analysis. To put more simply, an analysis-method is a way in which to explain or understand what the law is.

For instance: Hart believes a "general and descriptive" analysis-method should be followed when generating a set of propositions about the law.[19] Hart's analysis-method is *general* in the sense that it seeks to provide an explanatory account of the "same general form and structure" that the law takes in different cultures and in different times.[20] Hart's object of analysis is "a complex social and political institution with a rule-governed (and in that sense 'normative') aspect" that the concept of law denotes.[21] Hart's investigation into

[19] Hart, *Concept of Law*, 239.
[20] Hart, *Concept of Law*, 239-240.
[21] Hart, *Concept of Law*, 239.

law does not concern what is the particular or accidental content or features of (i) laws, (ii) sub-systems of laws (e.g., common law, criminal law, commercial law, etc.), or (iii) legal systems (e.g., French Law, United Kingdom Law, United States Law, etc.). Hart's analysis-method is *descriptive* in the sense that "it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law."[22] In other words, Hart believes that his descriptive analysis-method is morally neutral and non-justificatory in explaining what the law is.[23]

In addition, like Hart, Raz accepts an analysis-method that is general and descriptive. Raz, though, describes the *general* aspect of Hart's analysis-method differently. Raz's subject of investigation is the nature of the law as the character of certain systemic rules—as a unified system of rules and as individual rules[24]—that pertain to governance of human conduct in a municipality. Raz writes, "At its most fundamental, legal philosophy is an inquiry into the nature of law."[25] Raz's analysis-method seeks to explain necessarily true properties of the law because, according to Raz, "only necessary truths about the law reveal the nature of the law."[26] (In Section II.A, I unpacked what a necessarily true feature of the law is for Raz.) That is not to suggest that the analysis-methods that Hart and Raz accept seek to explain different features about the law. Instead, I believe that Raz uses different

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[22] Hart, *Concept of Law*, 240.

[23] Hart, *Concept of Law*, 240.

[24] To be clear, for Raz, the subject of the law is twofold. The first aspect of law can refer to the character of these certain systemic rules as a unified system of rules. People can refer to a unified system of rules with expressions such as "the law," "a legal system," and "a system of laws," but not only those expressions. The second aspect of law can refer to the character of these certain systemic rules as individual rules. People can refer to an individual rule or rules with expressions such as "a law" or "laws," but not only those expressions.

[25] Raz, "Two Views of the Nature of the Theory of Law," 251.

[26] Raz, "Can There Be a Theory of Law," 328.

language to describe the same features that Hart's general analysis-method seeks to explain.[27]

Dworkin, by contrast, believes an interpretive analysis-method, which he calls "constructive interpretation," should be followed when generating a set of propositions about the law. Dworkin writes, "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[28] For Dworkin, to show the law "in its best light" is

[27] Moreover, Raz clarifies the object of analysis more explicitly than Hart. For Raz, explaining "the nature of law" is not the same as explaining the word "law" and its meaning or "the concept of law." Raz writes, "Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other." (Raz, "Can There Be a Theory of Law," 325.) For Raz, then, the concept of law and the word "word" and its meaning are not identical to each other or to the nature of the object that the concept denotes and the word expresses. Firstly, according to Raz, the word "law" is not ambiguous. Whether people use the word "law" in a legal context, or a religious context, or a mathematical context, or any other context, Raz believes that people use this word "to refer to rules of some permanence and generality, giving rise to one kind of necessity or another." (Raz, "Can There Be a Theory of Law," 325.) However, Raz's legal theory is not explaining this meaning of the word "law." Raz acknowledges that people "express the concept, use [the concept], and refer to [the concept] by using words." (Raz, "Can There Be a Theory of Law," 325.) Nevertheless, Raz believes that people need not use the word "law" to refer to the concept of law. People still express, use, and refer to the concept of law, for example, when they talk about the system of courts, legislature, and the rules that each endorses in a state. Raz believes that the context of a discussion about the law is enough to determine whether people are talking about the law as a unique institutionalized normative system or as scientific, mathematical, or other rules of necessity. For Raz, then, "[t]he availability of context to determine reference establishes that there is no need for concepts to be identified by the use of specific words or phrase." (Raz, "Can There Be a Theory of Law," 325.) Secondly, according to Raz, law is a concept—our concept of law, to be sure—that people use to denote a particular object in our society. Raz writes, "Talk of *the* concept of law really means *our* concept of law." (Raz, "Can There Be a Theory of Law," 331.) "While *the concept* of law is parochial, that is, not all societies have it," Raz writes, "our inquiry is universal in that it explores *the nature* of law, wherever it is to be found." (Raz, "Can There Be a Theory of Law," 332.) For Raz, then, the law is a local or a culture specific concept, but the nature of law refers to a set of necessarily true properties that could be found in any society, even in a society that uses a different concept or no concept at all to designate the object that our society considers law. Consequently, for those reasons, Raz believes that explaining "the nature of law" is not the same as explaining the word "law" (and its meaning) or "the concept of law."

[28] Dworkin, *Law's Empire*, 52.

to identify the principle that achieve an equilibrium between (1) providing an interpretation that is the best "fit" with the legal materials and practice of a community and (2) providing an interpretation that is the best moral justification of those legal materials and practices of the community.[29] Dworkin's constructive interpretation is partly evaluative and justificatory as a result of the second dimension involving moral and political argument. In addition, Dworkin writes, "Interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong."[30] Dworkin's constructive interpretation of law is particular rather than general.

In contrast to Hart, Raz, and Dworkin, Finnis believes a complex analysis-method, which is partly descriptive and morally evaluative, should be followed when generating a set of propositions about the law. Finnis's analysis-method does not seek to explain the various phenomena that the "ordinary concept" of law denotes. Instead, Finnis analysis-method aims to develop a concept—namely, the central case of law—that explains the various phenomena, which "ordinary" talk about law refers to (in an unfocused way), and explains these various phenomena by evaluating whether they satisfy (completely or partially) the standing *moral* requirements of practical reasonableness relevant to this broad area of human concern and interaction.[31] However, Finnis believes "the undertaking cannot

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[29] Dworkin, *Law's Empire*, 90, 411.

[30] Dworkin, *Law's Empire*, 102.

[31] Finnis, *Natural Law and Natural Rights*, 1, 18-19, 278-279. I paraphrase primarily from the following passage by Finnis: "My purpose has not been to explain an unfocused 'ordinary concept' but to develop a concept for use in a theoretical explanation of a set of human actions, dispositions, interrelationships, and conceptions which (i) hang together as a set by virtue of their adaptation to a specifiable set of human needs considered in the light of empirical features of the human condition, and (ii) are accordingly found in very varying forms and which varying degrees of suitability for, and deliberate or unconscious divergence from, those needs as the fully reasonable person would assess them. To repeat: the intention has been not to explain a concept, but to develop a concept

proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities, a knowledge that requires the assistance of descriptive and analytical social science."[32] Hence, Finnis's analysis-method is partly descriptive (as conceived by Hart and Raz).

Starting-Points

Theorists have methodological disagreements about what *starting-point*(*s*) should theorists follow to generate a set of propositions about the law that produces an accurate and adequate account of what the law is. A starting-point is a pretheoretical proposition about the law or a related phenomenon that serves as (a part of) the foundation for a set of propositions about the law: viz., a point from which a theorist should start or organize an account of the law.

For instance: Hart's starting-point for his explanatory task is the common knowledge Hart attributes to any educated man of the salient features of a modern municipal legal

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which would explain the various phenomena referred to (in an unfocused way by 'ordinary talk about law—and explain them by showing how they answer (fully or partially) to the standing requirement of practical reasonableness relevant to the broad area of human concern and interaction." (Finnis, *Natural Law and Natural Rights*, 278-279.) Moreover, I emphasize "moral" above to clarify for the reader the connection between the term "moral" and Finnis's expression "practical reasonableness." Finnis writes, "But the term 'moral' is of somewhat uncertain connotation. So it is preferable to frame our conclusion in terms of practical reasonableness." (Finnis, *Natural Law and Natural Rights*, 15.) Finnis's requirements of practical reasonableness are no doubt a specific form of moral requirement.

[32] Finnis, *Natural Law and Natural Rights*, 18-19. Finnis concludes: "There is thus a mutual though not quite symmetrical interdependence between the project of describing human affairs by way of theory and the project of evaluation human options with a view, at least remotely, to acting reasonably and well. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is unlikely to judge will in discerning the practical implication of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illumination and significant." (Finnis, *Natural Law and Natural Rights*, 19.)

system, which, to sum, are various rules and institutions of a legal system.[33] Ultimately, Hart believes an analysis of the law should start by explaining the contrast between guiding the conduct of officials and citizens of a municipality by various rules of a legal system versus by various forms of commands and coercions.[34] As a result, to carry out his explanatory enterprise, Hart uses a number of concepts to denote the various types of rule of a legal system: e.g., duty-imposing rules, power-conferring rules, rules of recognition, rules of change, and primary and secondary rules.

However, Raz believes an analysis of the law should start by explaining the contrast between guiding the conduct of officials and citizens of a municipality by the various reasons for action that various norms (or rules) of a legal system provide versus by the various reasons for actions that commands, promises, and other norms (that belong to other institutionalized or non-institutionalized normative systems) provide. That is not to suggest that Raz does not use a host of Hart's concepts to denote the various norms of a legal system. He does indeed. In addition, Raz uses concepts to denote the various types of reasons for actions: first-order reasons, second-order reasons, and exclusionary reasons, to name a few. The difference between Hart's and Raz's starting-points is subtle: Hart believes that the various rules of a legal system should be explanatory primary, whereas Raz believes

[33] Hart, *Concept of Law*, 3, 240. The term "educated man" is original to Hart. An educated person, as the term Hart uses in *Concept of Law*, is not synonymous with an individual who is a lawyer, judge, or legal theorist, all of whom Hart would expect to have professional or expert knowledge of the law. An educated person appear to be nothing more than an individual with general familiarity in comparative law and civics: viz., a person who is at least understands that the laws of a community form some sort of a system and that many separate communities in the world share similar structural features in spite of important differences. Thus, Hart understands himself to be setting a low standard of who is capable of roughly pinpointing the essential features of municipal legal systems.

[34] Hart, *Concept of Law*, 38-42.

that the various reasons for actions that the various norms of a legal system provide should be explanatory primary.

Dworkin believes that a constructive interpretation of the law entails imposing a purpose or point on law to show it "in its best light." A constructive interpretation of law should be given in terms of the abstract point or function the law that Dworkin imposes: namely, to regulate and justify use of collective force by government.[35] According to Dworkin, the preinterpretive (or pretheoretical) proposition about the point of the law is "an abstract account that organizes further argument about law's character."[36] Ascribing a purpose on law, then, is necessary for the constructive interpretation process to get underway.[37] Only after a theorist ascribes a purpose to the law can the theorist interpret the law constructively.[38]

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[35] Dworkin, *Law's Empire*, 93. To use Dworkin's words: "Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld expect as licensed or required by individual rights and responsibilities flowing from the past political decisions about when collective force is justified."

[36] Dworkin, *Law's Empire*, 93.

[37] Cf. Dickson, *Evaluation and Legal Theory*, 105.

[38] Moreover, Dworkin believes that a constructive interpretation of the law entails that the theorist or participant have an "interpretative attitude" towards the social practice, such as the law. An interpretive attitude has two components. The first is the assumption that a social practice does not simply exist but has value: viz., "that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice." (Dworkin, *Law's Empire*, 47.) The second is the further assumption the requirements of a social practice, which, for Dworkin, refer to the conduct it requires or judgments it warrants, "are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point." (Dworkin, *Law's Empire*, 47.) Dworkin writes, "Once this interpretive attitude takes hold… [p]eople now try to impose meaning on the institution—to see it in its best light—and then to restructure it in the light of that meaning." (Dworkin, *Law's Empire*, 47.) Thus, those two components of theorists' or participants' interpretive attitude, I believe, is important part of the foundation of Dworkin's theory of law, that is, another starting-point.

Finnis's starting-point for his explanatory and morally evaluative analysis of law is multifaceted. Finnis writes, "There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy."[39] First, a theorist should identify those goods. Second, a theorist should identify those requirements of practical reasonableness. For Finnis, a theorist cannot *begin* a theoretical description and analysis of the institution of human law, *until* the theorist "also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."[40] Finnis claims, "For the theorist cannot identify the central case of that practical viewpoint which he uses to identify the central case of his subject-matter, unless he decides what the requirements of practical reasonableness really are, in relation to this whole aspect of human affairs and concerns."[41] Without the first two dimensions, the theorist cannot even identify the viewpoint that Finnis believes a theorist should undertake to identify the central case of law accurately and adequately. Third, a theorist should accept the law as having the function of guiding the conduct of officials and citizens of a community in accordance with those requirements of practical reasonableness and thereby securing those social goods that require the coordination of a community because a community cannot secure those social goods, easily or at all, without it.[42] For Finnis, an analysis of law should be in terms of the social goods, the requirements of practical reasonableness, and the function of law that Finnis ascribes.

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[39] Finnis, *Natural Law and Natural Rights*, 3.
[40] Finnis, *Natural Law and Natural Rights*, 3.
[41] Finnis, *Natural Law and Natural Rights*, 15.
[42] Finnis, *Natural Law and Natural Rights*, 1, 14-15. In addition, cf. Dickson, *Evaluation and Legal Theory*, 8-9, 46-47; and Bix, *Jurisprudence*, 74.

Participant-Perspectives

A third example is theorists' methodological disagreement about what *participant-perspective*(*s*) or *viewpoint*(*s*) should theorists follow to generate a set of propositions about the law that produces an accurate and adequate account of what the law is. A participant-perspective is a community member's beliefs, judgments, attitudes, and/or understandings about the law: viz., the perspective or viewpoint of a judge, lawyer, citizen, anarchist, or "bad man," to name a few. A theorist decides to adopt or observe a participant-perspective as data to explain or an experience to participate in for the theorist's analysis of the law. A theorist decides to accept a particular participant-perspective instead of an alternative because the theorist believes that adopting or observing that participant-perspective is necessary to explain what the law is accurately and adequately. A theorist's selection of a participant-perspective further narrows what is significant or necessary for the theorist to explain in an analysis of law. The basis for a theorist's selection of a participant-perspective is his other methodological commitments, such as an analysis-method, a starting-point, a checking-point (which I discuss below), in addition to the various interests or problem that trouble him at the time.[43]

For instance: In an analysis of law, Hart believes that a theorist should observe and explain the participants who accept an "internal point of view" towards the rules of a legal system. According to Hart, those participants "are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticisms, or punishment, viz., in all the familiar

[43] Cf. Bix, *Jurisprudence*, 4.

transactions of life according to rules."[44] In doing a descriptive analysis of law, Hart states that a theorist "does not as such himself share the participants' acceptance of the law in these ways, but [the theorist] can and should describe such acceptance."[45] In other words, in a "descriptive" analysis of law, Hart believes that a theorist should *understand* what is for participants to adopt the internal point of view, without accepting, endorsing, or condemning the participants' internal point of view.[46] Raz accepts a participant-perspective for his analysis of the law that is similar to Hart's internal point of view. Thus, to use Raz's words: "It falls to legal theory to pick on those [feature of the social phenomenon] which are central and significant to the way the concept plays its role in people's understanding of society, to elaborate and explain them,"[47] that is, "to advance our understanding of society by helping us understand how people understand themselves."[48]

In contrast to Hart and Raz, in a constructive interpretation of law, Dworkin believes that a theorist should theorize as if the theorist is a participant in the social practice, namely, the law. For a constructive interpretation of a social practice, such as the law, Dworkin believes that "a social scientist [or theorist] must participate in [the] social practice if he hopes to understand it, as distinguished from understanding its members."[49] Dworkin writes, "So, no firm line divides jurisprudence from adjudication or any other aspect of legal practice."[50] Dworkin's interpretive analysis of law is a participation in law, which, for

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[44] Hart, *Concept of Law*, 90.
[45] Hart, *Concept of Law*, 242 (brackets added).
[46] Hart, *Concept of Law*, 242.
[47] Raz, *Ethics in the Public Domain*, 237 (brackets added).
[48] Raz, *Ethics in the Public Domain*, 237.
[49] Dworkin, *Law's Empire*, 55 (brackets added).
[50] Dworkin, *Law's Empire*, 90.

Dworkin, necessarily involves moral evaluation and justification of the law instead of descriptive explanation of the law.

In contrast to Hart, Raz, and Dworkin, Finnis believes that a theorist should explain and thereby morally evaluate the law as if a theoretical practically reasonable participant. Finnis states, "If there is a viewpoint in which the institution of the Rule of Law, and compliance with rules and principles of law according to their tenor, are regarded as at least presumptive requirements of practical reasonableness itself, such a viewpoint is the viewpoint which should be used as the standard of reference by the theorist describing the features of legal order."[51] However, among those participants that regard law from a practical viewpoint as an aspect of practical reasonableness, Finnis believes that "there will be some whose views about what practical reasonable actually requires in this domain are, in detail, more reasonable than others."[52] Thus, Finnis adopts the viewpoint of the participants "who not only appeal to practical reasonableness but also *are* practically reasonable."[53] Finnis's analysis of law is in terms of a participant who commits to the requirements of practical reasonableness and who appeals to those requirements to understand what the law is.

Checking-Points

A fourth example is theorists' methodological disagreements about what *checking-point*(*s*) should theorists satisfy to generate a set of propositions about the law that produces an accurate and adequate account of what the law is. A checking-point is a pretheoretical

[51] Finnis, *Natural Law and Natural Rights*, 15.
[52] Finnis, *Natural Law and Natural Rights*, 15.
[53] Finnis, *Natural Law and Natural Rights*, 15.

intuition or proposition about the law or a related phenomenon that a theorist should explain for an account that furthers our understanding of what the law is. Unlike a starting-point, a checking-point usually is not part of the foundation on which a theorist generates an account of the law and thereby usually is not necessary for a theorist to begin an analysis of the law. Some theorists compare attempts to satisfy checking-points to intuition matching because a theorist constructs a set of propositions about the law to match the theorist's pretheoretical intuitions concerning the subject.[54]

For instance: Raz accepts as a checking-point that an analysis of the law should explain the way in which our ordinary concept of law allows for the possibility of moral (or just) and immoral (or unjust) legal rules, which provide reasons for actions regardless of their moral soundness or acceptability, in legal system of a community. Raz believes that our concept or law could designate as legal system that contains immoral legal rules (or laws) as the law. According to Raz, many people do not rule out particular laws in the legal system of their community as non-laws, which provide no reasons for actions, when those laws are immoral.[55] Thus, for Raz, an explanation of the law should account for how people can believe that the law of their community is still the law, even if they believe the law is morally unsound or unacceptable. However, Raz writes, "While rejecting any explanation of the nature of law… which is true only if the law is morally good, we must also reject any explanation which fails to make it intelligible."[56] Raz assumes that, "while the law may be morally indefensible, it must be understood as a system which many people believe to be

[54] See Leiter, "Realism, Hard Positivism, and Conceptual Analysis," 546-547; and Leiter, "Beyond the Hart/Dworkin Debate," 43-51.
[55] Raz, *Practical Reason and Norms*, 164.
[56] Raz, "Intention and Interpretation," 260.

morally defensible."[57] For Raz, then, an account of the law also "must explain how people can believe that their law, the law of their country, is morally good."[58]

Dworkin accepts a checking-point that requires a theorist to explain the theoretical disagreements about law that judges and lawyers (i.e., participants of the legal practice) actually do have.[59] Dworkin believes that theoretical disagreements concern the grounds of law, which is comprised of various propositions of historical fact and political morality. For Dworkin, "propositions of law" are "all the various statements and claims people make about what the law allows or prohibits or entitles them to have."[60] According to Dworkin, propositions can very general (e.g., "the law forbids states to deny anyone equal protections within the meaning of the Fourteenth Amendment"), or much less general (e.g., "the law does not provide compensation for fellow-servant injuries"), or very concrete (e.g., "the law requires Acme Corporation to compensate John Smith for the injury he suffered in it employ last February").[61] Dworkin believes "[l]awyers and judges… assume that some propositions of law, at least, can be true or false."[62] Whether propositions are true depends on "other, more familiar kinds of propositions," which Dworkin calls "the grounds of law." Thus, for Dworkin, to account for lawyers and judges theoretical disagreements, a theorist must explain how lawyers and judges "might disagree about the grounds of law, about which other kinds of propositions, which if true, make a particular proposition of law true."[63]

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[57] Raz, "Intention and Interpretation," 260.
[58] Raz, "Intention and Interpretation," 260.
[59] Dworkin, *Law's Empire*, 46-47.
[60] Dworkin, *Law's Empire*, 4.
[61] Dworkin, *Law's Empire*, 4.
[62] Dworkin, *Law's Empire*, 4 (brackets added and note omitted).
[63] Dworkin, *Law's Empire*, 5.

III. THE SECOND FACTOR OF THE METHODOLOGY CONFLICT

Heretofore, I showed that Hart, Raz, Finnis, and Dworkin endorse and follow different methodological guidelines (at least concerning the four categories that I illustrated above) to provide an accurate and adequate legal theory that furthers our understanding of the law. If nothing else, F1 establishes that in jurisprudence (a) different methodologies exist and (b) each theorist believes that at least his legal theory should satisfy the methodology he endorses. Nevertheless, theorists' disagreement about S2 is more complex than the conclusion that each theorist follows the methodology he endorses when generating a theory of law. Theorists respond to the diverse methodologies with opposing approaches: namely, imperialism and relativism.

I believe that theorists' commitment to rival approaches in response to the diverse methodologies (i.e., F2) fully develops the complex character of the methodology conflict. I explain imperialism and relativism in Section III.A and Section III.B, respectively. I demonstrate that a theorist's commitment to imperialism or relativism affects two issues: (1) whether he believes theorists should accept *one* methodology or *multiple* methodologies to provide an accurate and adequate account of the law and (2) whether he believes *all* theorists or *some* theorists should follow the accepted methodology or methodologies. The different responses that imperialism and relativism provide for these two issues are central to understanding the complex character of theorists' disagreement about S2.[64]

[64] To be sure, I do not want to offer criticism or praise of either approach under investigation at this time. I only want to describe and exemplify the central features of each approach. Later, in the next two sections, I discuss and comment on the implications of imperialism and relativism for theorists' debate about S1.

A. Imperialism

Theorists that accept imperialism (who I call *imperialists*) in response to the diverse methodologies in jurisprudence claim supremacy for one particular methodology as the most or only important way to understand what the law is accurately and adequately.[65] Imperialists attempt to demonstrate that all theorists should follow a single methodology to further our understanding of the law.[66] "The practice of this widely-held 'winner take all' commitment involves the attempt either to exclude or disvalue alternative [methodologies]," explains Michael Giudice, "by showing that such [methodologies] will miss or distort what is important about law and its legal practice."[67] While imperialists agree about the approach to deal with or respond to theorists' methodological differences, many imperialists disagree about which methodology to accept as the proper methodology. In this subsection, I provide examples of a few theorists—namely, Finnis, Dworkin, and Leiter—that each accept imperialism and yet differ as to which methodology he believes all theorists should follow to generate a legal theory that furthers our understanding of the law.

For example, Finnis accepts imperialism and claims his methodology is the most or only important methodology for all theorists to endorse and satisfy. According to Finnis, his evaluative or normative starting-points and analysis-method are far superior for jurisprudence than the methodologies of his rivals. In a recent article, Finnis argues that "the primary reality of law" is the proper focus and starting-point for all theorists to adopt in

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[65] Cf. Giudice, "Understanding Diversity," 510.

[66] Cf. Giudice, "Understanding Diversity," 509.

[67] Giudice, "Understanding Diversity," 510 (brackets added). I replaced "approaches" with the first brackets and "approaches and methods" with the second brackets. I replaced these terms with equivalent terms that are consistent with the terminology I use in this thesis.

jurisprudence.[68] Finnis writes, "The primary reality of the law is… in its claim, as itself a moral requirement, on my deliberating about what to decide—that is, what to judge about the options available to me, and what to choose and do once I have made my judgment. This mode of our *positive law's* existence—as a morally legitimate and compelling, albeit conditionally and only defeasibly compelling, claim on my action when I am thinking what to do as a plain citizen (child or adult), a judge, a police officer, a tax inspector, or executor, and so forth—is the primary reality of *law*."[69] For Finnis, the primary reality of law is neither in its necessarily true properties nor in its officials' and subjects' (e.g., judges, lawyers, and citizens) understandings of or attitudes toward it, which are central subjects in methodological guidelines accepted by Hart and Raz.[70] In addition, the primary reality of law is not in its officials' and subjects' experiences or behaviors in terms of either cause and effect or patterns of recurrence, which are central subjects in methodological guidelines adopted by Richard Posner and Brian Leiter.[71]

According to Finnis, the law's claim as a moral requirement "is primary because the rational force of this claim is fully intelligible even before one knows anything much about the content of the law and certainly before one has been taught anything about law in general or 'the concept of law.'"[72] Finnis believes the primary reality of law justifies his claim of supremacy for his methodology as the proper methodology to follow in order to produce a legal theory that furthers our understanding of the law. Finnis writes, "In short, a

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[68] Compare example with Giudice, "Understanding Diversity," 512-513.
[69] Finnis, "Law and What I Truly Should Decide," 112-113.
[70] Finnis, "Law and What I Truly Should Decide," 112.
[71] Finnis, "Law and What I Truly Should Decide," 112.
[72] Finnis, "Law and What I Truly Should Decide," 113.

complete and fully realistic theory of law can be and in all essentials has been worked out from the starting point of the one hundred percent normative question, what should I decide to do…. I can think of no interesting project of inquiry left over for a philosophical theory of law with any *different* starting point."[73] Thus, for Finnis, a theorist that adopts a different starting-point by which to begin a legal theory will miss something important or necessary to explain what the law is accurately and adequately.

However, Leiter claims that "Finnis admits… that positivism—understood either in Hart's or Raz's version—gives an adequate account of [quoting Finnis] 'what any competent lawyer… would say are (or are not) intra-systemically valid laws, imposing legal requirements.'"[74] If Leiter is correct, Finnis's admission would be contrary to imperialism: viz., that different methodologies—at least ones that involve a general and descriptive analysis-method of the sort that Hart and Raz endorse—could also produce an accurate and adequate theory of law. In response to Leiter, Finnis writes: "But I made no admission about the 'adequacy' of anyone's account."[75] Finnis is "far from admitting that a normatively

[73] Finnis, "Law and What I Truly Should Decide," 115 (emphasis added).

[74] Leiter, "Beyond the Hart/Dworkin Debate," 28-29 (brackets added). Finnis's statement in full context is as follows: "Positivism never coherently reaches beyond reporting attitudes and convergent behaviour (perhaps the sophisticated and articulate attitudes that constitute a set of rules of recognition, change, and adjudication). It has nothing to say to officials or private citizens who want to judge whether, when, and why the authority and obligatoriness claimed and enforced by those who are acting as officials of a legal system, and by their directives, are indeed authoritative reasons for their own conscientious action. Positivism does no more than repeat (1) what any competent lawyer—including every legally competent adherent of natural law theory—would say are (or are not) intra-systemically valid laws, imposing 'legal requirements,' and (2) what any street-wise observer would warn are the likely consequences of non-compliance. It cannot explain the authoritativeness, for an official's or a private citizen's conscience (ultimate rational judgment), of these alleged and imposed requirements, nor their lack of such authority when radically unjust. Positivism is in the last analysis redundant." (Finnis, "On the Incoherence of Legal Positivism," 1611.)

[75] Finnis, "Law and What I Truly Should Decide," 122.

inert description of law gives an adequate account of anything."[76] Finnis believes that a general and descriptive analysis-method "gives no account, no theory or what Hart would call elucidation or explanation, at all, let alone an adequate one."[77]

In contrast to Finnis, Dworkin asserts that his starting-point is a necessary part of the proper methodology for all theorists to endorse and follow. Julie Dickson in *Evaluation and Legal Theory* best characterizes Dworkin's imperialist commitment to his preinterpretive proposition about the function or point of law. According to Dickson, one would not necessarily suspect that Dworkin accepts imperialism in response to different starting-points from the manner in which he introduces his staring-point in *Law's Empire*. Dworkin seems keen to play down its significance and possible implications, explains Dickson, "presenting it merely as a starting point which is necessary in order to get us all into the same interpretive ballpark."[78] Dworkin describes his preinterpretive proposition about the function of law as "an abstract account that organizes further argument about law's character," which is "suitably airy" and "sufficiently abstract and uncontroversial."[79] However, for Dickson, Dworkin appears to believe that espousing his view of law's function "is essential to any adequate legal theory."[80] For example, Dworkin claims legal

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[76] Finnis, "Law and What I Truly Should Decide," 123.

[77] Finnis, "Law and What I Truly Should Decide," 123. Finnis writes, "The aspiration to be normatively inert makes it impossible to provide any explanation of the kind Hart was seeking throughout his work." (Finnis, "Law and What I Truly Should Decide," 123.) This is the reason why Finnis believe legal positivism is incoherent. Finnis explains the incoherence of legal positivism as "its inherent and self-imposed incapacity to succeed in the explanatory task it sets itself." (Finnis, "On the Incoherence of Legal Positivism," 1608.) For further explanation on the sense in which a descriptive analysis-method makes a theory of law impossible, see my discussion of imperialism in Section V.A.

[78] Dickson, *Evaluation and Legal Theory*, 107.

[79] See Dworkin, *Law's Empire*, 93-94.

[80] Dickson, *Evaluation and Legal Theory*, 113.

theories authored by Hart and Raz, who accept different starting-points, must understand the law as having the function of justifying state coercion if their legal theories are to be plausible accounts of the law.[81] Dworkin believes that "[a] conception of law *must* explain how what it takes to be law provides a general justification for the exercise of coercive power by the state."[82] Dickson concludes that Dworkin allows no alternative starting-point to his own: viz., "all legal theories which are worth considering seriously presuppose or depend upon arguments about law's function which are broadly similar to those advocated in his own theory."[83]

In addition, Dworkin believes his analysis-method is far superior for jurisprudence than the analysis-methods of his rivals. For Dworkin, "[g]eneral theories of law… are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice."[84] Dworkin claims that the various social-scientific and morally neutral analysis-methods' "emphasis on fact and strategy ended by distorting jurisprudential issues in much the same way as the English doctrinal approach distorted them, that is, by eliminating just those issues of moral principle that form their core."[85] Dworkin, that is, believes that social-scientific analysis-methods (endorsed by Posner and Leiter) and descriptive analysis-methods (endorsed by Hart and Raz) are unacceptable methodological guidelines because each misses or distorts what is important or necessary to explain about the law. "If

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[81] Dworkin, *Law's Empire*, 429-430 note 3; and cf. Dickson, *Evaluation and Legal Theory*, 113.
[82] Dworkin, *Law's Empire*, 190 (emphasis added and brackets added).
[83] Dickson, *Evaluation and Legal Theory*, 113.
[84] Dworkin, *Law's Empire*, 90 (brackets added).
[85] Dworkin, *Taking Rights Seriously*, 4.

jurisprudence is to succeed," according to Dworkin, "it must expose these issues [of moral principle] and attack them as issues of moral theory."[86] Thus, for Dworkin, his analysis-method, which is interpretive and justificatory, *and not* social-scientific and morally neutral, is the only or best way to explain what the law is accurately and adequately.

In contrast to Finnis and Dworkin, Leiter asserts that his social-scientific analysis-method is a necessary part of the proper methodology for all theorists to endorse and follow. Leiter endorses a social-scientific analysis of the law for jurisprudence, which he calls "the naturalist method." Leiter believes the naturalist method comprises of two subsidiary theses. First, the substantive thesis: "[w]ith respect to questions about what there is and what we can know, we have nothing better to go on than successful scientific theory."[87] Second, the methodological thesis: "[i]nsofar as philosophy is concerned with what there is and what we can know, it must operate as the abstract branch of successful scientific theory."[88] For Leiter, the best explanation of law "is the one that figures in the most fruitful *a posteriori* research programs (i.e., the ones that give us the best going account of how the world work)":[89] that is, the account of what law must be if current successful scientific theory is to be true and explanatory.[90]

Leiter reveals his imperialist commitment to his the naturalist method in a two-step argument that attempts to eliminate other analysis-methods (such as those endorsed by Hart, Raz, Finnis, and Dworkin) as acceptable ways to investigate and explain the law. The first

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[86] Dworkin, *Taking Rights Seriously*, 7 (brackets added).
[87] Leiter, "Beyond the Hart/Dworkin Debate," 49 (brackets added).
[88] Leiter, "Beyond the Hart/Dworkin Debate," 49 (brackets added).
[89] Leiter, "Realism, Hard Positivism, and Conceptual Analysis," 547.
[90] See Leiter, "Beyond the Hart/Dworkin Debate," 49, 51. For further explanation of Leiter's analysis-method, see Leiter, "Toward a Naturalized Jurisprudence."

step of Leiter's argument attacks the sort of analysis-method that Hart and Raz endorse. His concern about a general and descriptive analysis-method is not that "it is descriptive—of course it is (or tries to be)—but rather that it relies on two central argumentative devices—analyses of concepts and appeals to intuition—that are epistemologically bankrupt," explains Leiter.[91] He thinks "epistemic values conjoined with Hart's dominant methods—conceptual analysis and appeals to intuition—can deliver no more than ethnographically relative results."[92] While contemporary philosophers occasionally give "a polite nod" to W.V.O. Quine's seminal attack on the analytic-synthetic distinction,[93] which Leiter uses to support his argument, he believes theorists in jurisprudence do not take its consequences seriously enough: "namely that the claims of conceptual analysis are *always* vulnerable to the demands of *a posteriori* theory construction."[94] For Leiter, things should not be any different in legal philosophy. "Philosophy becomes unsatisfying…," writes Leiter, "when it

[91] Leiter, "Beyond the Hart/Dworkin Debate," 43-44.

[92] Leiter, "Beyond the Hart/Dworkin Debate," 51.

[93] To sum Quine's argument, Leiter writes: "Philosophers long thought that some truths were necessary while others were contingent; in the twentieth century, under the influence of logical positivism, this was taken to be the distinction between those statements that were 'true in virtue of meaning' (hence necessarily true) and those that were 'true in virtue of fact' (hence only contingently true). The former 'analytic' truths were the proper domain of philosophy; the latter 'synthetic' truths the proper domain of empirical science. Quine argued that the distinction could not be sustained: all statements are, in principle, answerable to experience, and, conversely, all statements can be maintained in the face of recalcitrant experience as long as we adjust other parts of our picture of the world. So there is no real distinction between claims that are 'true in virtue of meaning' and 'true in virtue of facts,' or between 'necessary' and 'contingent' truths; there is simply the socio-historical fact that, at any given point in the history of inquiry, there are some statements we are unlikely to give up in the face of recalcitrant empirical evidence, and others that we are quite willing to give up when empirical evidence conflicts." (Leiter, "Beyond the Hart/Dworkin Debate," 44.)

[94] Leiter, "Realism, Hard Positivism, and Conceptual Analysis," 546 (note omitted).

turns into intuition-mongering and armchair sociology about what is really fundamental to 'our' concepts."[95] His solution is to turn to successful social scientific theory.

The second step of Leiter's argument attacks the other opposing analysis-method (in contrast to his own) to a general and descriptive analysis method: namely, the normative sort that Finnis and Dworkin endorse. According to Leiter, theorists who endorse a normative type of analysis-method usually believe "epistemic values are not enough to demarcate [their] subject-matter."[96] Their solution is to turn to moral evaluation of law to demarcate the object of jurisprudential inquiry. In comparison with his solution, Leiter somewhat rhetorically asks the following: in figuring out what the law is (essentially), should theorists turn to morality or to science?[97] Leiter writes, "I think the answer is clear," saving the argument for a different occasion.[98] I understand the correct answer to be *science* for Leiter, which, in effect, claims superiority over a normative type of analysis-method.

To conclude, imperialists seek to command or establish the acceptance of one methodology as the proper methodology. Each imperialist requires all theorists to follow the methodology he (the imperialist) endorses in order to produce a single and complete legal theory that furthers our understanding of what the law is. For example, suppose β (an imperialist) endorses a particular methodology, say M_1. β, under imperialism, believes all theorists should follow M_1 to provide an accurate and adequate theory of law. If α (a theorist) endorses and follows another methodology (other than M_1), β would automatically

[95] Leiter, "Realism, Hard Positivism, and Conceptual Analysis," 546 (note omitted).
[96] Leiter, "Beyond the Hart/Dworkin Debate," 51 (brackets added).
[97] Leiter, "Beyond the Hart/Dworkin Debate," 51.
[98] Leiter, "Beyond the Hart/Dworkin Debate," 51.

conclude α's legal theory is inaccurate and inadequate in some way because α will miss or distort what is important or necessary to explain about the law.

B. Relativism

However, not all theorists accept imperialism. Some theorists believe relativism is the appropriate response to theorists' methodological differences. Theorists that accept relativism (who I call *relativists*) believe theorists' methodologies can, do, and should differ in their various fundamental subjects, projects, and approaches to understand the law in diverse ways.[99] "Once one sees that different theorists are answering different questions and responding to different concerns"—that different theorists accept different methodologies by which to generate an account of the law—"one can see how these theorists are often describing disparate aspects of the same phenomenon," explains Brian Bix in *Jurisprudence*.[100] Relativists view each unique methodology as a partial and important way to further our understanding of what the law is.[101] The practice of relativism involves showing that methodologies are different from each other, but nonetheless are compatible or continuous with each other.

For example, in the "Postscript" to the second edition of *Concept of Law*, Hart distinguishes Dworkin's methodology from his methodology. According to Hart, legal theory conceived in a manner as both general and descriptive (such as his methodology) "is a radically different enterprise from Dworkin's conception of legal theory… as in part evaluative and justificatory and as 'addressed to a particular legal culture,' which is usually

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[99] Cf. Giudice, "Understanding Diversity," 515.
[100] Bix, *Jurisprudence*, 3.
[101] Cf. Giudice, "Understanding Diversity," 523.

the theorist's own and in Dworkin's case is that of Anglo-American law."[102] "It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conception of legal theory," writes Hart.[103] He believes that "the partly evaluative [and justificatory] issues which Dworkin calls 'interpretive' are not the only proper issues for jurisprudence and legal theory, and that there is an important place for general and descriptive jurisprudence."[104] Hart resolves their methodological differences with an approach contrary to imperialism: he rejects Dworkin's methodology as being the only important or proper methodology for jurisprudence, but not as being a partial and important way to understand the law. His position here suggests he accepts relativism: namely, that each theorist can and should follow the methodology he endorses in order to produce a partial and important legal theory that furthers our understanding of the law in diverse way.

Relativists accept a principle explicitly or implicitly, which I call the principle of methodological relativity: a legal theory is (and should be understood) relative to the methodology that the theorist (who generated the set of propositions about the law) endorses. "The possibility that claims in legal theory may sometimes be relative to a particular purpose or a particular viewpoint does not empty legal theory of all significance or interest. I think the opposite may be true," writes Bix.[105] The significance of relativism is that the *accuracy and adequacy* of a legal theory is (and should be understood) relative to

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[102] Hart, *Concept of Law*, 240 (note omitted). I clarified this methodological difference and several others between Hart and Dworkin in Section II.B. I need not reiterate each here.

[103] Hart, *Concept of Law*, 241.

[104] Hart, *Concept of Law*, 243 (brackets added).

[105] Bix, *Jurisprudence*, 4.

the methodology that the theorist (who generated the set of propositions about the law) endorses. For example, Hart provides a potentially accurate and adequate general and descriptive legal theory, whereas Dworkin provides a potentially accurate and adequate particular and interpretive legal theory. While relativism in jurisprudence has similarities with relativism in other philosophical contents, Bix believes "it is also compatible with a more traditional approach to truth."[106] Relativists in jurisprudence need not suggest that many truths exist, "only that the truth about a complex social or moral phenomenon is unlikely to be captured completely by any single theory [and methodology] alone."[107]

Once one understands that diverse methodologies are often present in completing analyses of law, Bix believes "one can understand why some 'debates' in the jurisprudential literature are best understood as theorists talking past one another."[108] Similarly, Michael Giudice claims that failure to distinguish or insensitivity to different methodologies "often leads us to see and think in terms of conflicts where conflicts do not really exist."[109] Nonetheless, Bix qualifies that "[i]t is important to emphasize, though, that not all arguments in legal theory can be so cleanly and peacefully resolved."[110] In other words, different legal theories that possess different methodologies are not necessarily compatible or continuous theories of law in virtue of their methodological differences.

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[106] Bix, *Jurisprudence*, 4 at note 3.

[107] Bix, *Jurisprudence*, 4 at note 3 (brackets added). To be sure, Bix uses "theory" here to refer to "a set of propositions about the law," "an explanation of the law," "an account of the law," etc. I think adding "methodology" to Bix's statement is appropriate given the context of his discussion.

[108] Bix, *Jurisprudence*, 9.

[109] Giudice, "Understanding Diversity," 515.

[110] Bix, *Jurisprudence*, 4.

To conclude, relativists seek to establish the acceptance of each unique methodology as one partial and important way to understand the law. For relativists, a theorist can and should follow the methodology he endorses to provide a partial and important legal theory that furthers our understanding of what law is in a diverse way. For example, suppose β (a relativist) endorses a particular methodology, say M_2. β, under relativism, believes that at least he should follow M_2 to produce an accurate and adequate theory of law. In contrast to an imperialist, if α (a theorist) endorses and follows another methodology (other than M_2), β would not automatically conclude α's legal theory is inaccurate and inadequate in some way because α will miss or distort what is important or necessary to explain about the law. β believes α's methodology—like M_2—is one partial, important, and unique way to understand the law.

IV. WHY RESOLVE THE METHODOLOGY CONFLICT FIRST

Today, most theorists acknowledge their disagreement about S2 contributes in some way to their dispute about S1. In the previous two sections, drawing on literature by Hart, Raz, Finnis, Dworkin, Leiter, and other theorists, I illustrated the two factors that contribute to theorists' disagreement about S2: F1 and F2. The two factors explain the complex character of the methodology conflict. Theorists endorse different methodologies (F1), but, while every theorist believes *his* legal theory should follow the methodology *he* endorses, not every theorist believes *all* legal theories should follow the methodology *he* endorses (F2). I explained that F2 develops the normative dimension of the methodology conflict: an imperialist believes each legal theory should satisfy the methodology he (the imperialist) endorses, whereas a relativist believes each legal theory should satisfy the methodology the theorist (who constructed the set of propositions about the law under review) endorses. If nothing else, theorists' disagreement about S2 creates confusion about which methodology each legal theory should satisfy to provide an accurate and adequate theory of law, which, in turn, fuels their dispute about S1.

A key part of achieving a common answer to the question "what is law?" involves theorists evaluating the accuracy and adequacy of each other's legal theories. However, in the face of the methodology conflict, theorists advance towards achieving the primary goal of jurisprudence in two directions: *directly* or *indirectly*. The direct course works to reach agreement about which legal theory is accurate and adequate, without resolving theorists'

disagreement about S2. Hereafter, I term this direct course *pragmatism*.[111] The indirect course works to reach agreement about which methodology a legal theory should satisfy to be accurate and adequate, before resolving theorists' disagreement about S1. Answering whether theorists should resolve their disagreement about S2 before their dispute about S1 to accomplish the primary goal is the first task that this thesis's main question requires.

I argue in this section that theorists should resolve the methodology conflict first to be able to reach a common answer to the question "what is law?". In Section IV.A, I clarify theorists' goals, forms, and procedures for evaluating the accuracy and adequacy of legal theories. In Section IV.B, I show that accepting pragmatism in response to the methodology conflict is an insufficient approach to achieve the primary goal because theorists cannot agree about which legal theory is accurate and adequate unless they agree about which methodology a legal theory should satisfy to be accurate and adequate.

A. An Overview of Theorists' Examinations

Evaluating the accuracy and adequacy of each other's legal theories is a significant way theorists can resolve their disagreement about S1 and, in effect, reach a common answer that explains how people should understand what the law is in the community in which they live. The independent goal of each theorist's examination is to determine which legal theory is (the most) accurate and adequate and/or whether (and to what extent) a legal theory is accurate and adequate. The collective goal of theorists' examinations is to achieve agreement about which legal theory is (the most) accurate and adequate. A determination

[111] I use the term "pragmatism" only for the sake of convenience in this thesis: namely, to denote a more direct or practical approach to the primary goal in the sense that it seeks to resolve issues about the law and not issues about methodology. The use of the term "pragmatism" in this thesis has no connection with any school of thought in philosophy or any other discipline.

about which legal theory is (the most) accurate and adequate is essentially a statement about how people should understand the law. Agreement about which legal theory is (the most) accurate and adequate, accordingly, is tantamount to agreement about how people should understand the law (that is, a common answer to the question "what is law?"). Thus, the independent goal of each theorist's examination serves the collective goal of theorists' examinations, which, in turn, serves the primary goal of jurisprudence.

Typically, theorists evaluate the accuracy and adequacy of legal theories in two forms, which I call *comparative examination* and *non-comparative examination*. A non-comparative examination evaluates a single legal theory to determine whether a theorist's set of propositions about the law is accurate and adequate. A non-comparative examination involves (a) supporting or (b) criticizing the accuracy and adequacy of a theorist's set of propositions about the law. A comparative examination evaluates at least two legal theories in comparison with each other—usually ones that concern similar issues—to determine which theorist's set of propositions about the law is (the most) accurate and adequate. A comparative examination involves (a) supporting the accuracy and adequacy of one legal theory and (b) criticizing the accuracy and adequacy of any other legal theory.

Traditionally, when at least two theorists offer different propositions about the law concerning an issue, theorists use comparative examination (rather than in non-comparative examination) due to a basic intuition: namely, a single accurate and adequate explanation exists for each phenomenon or set of phenomena, such as what the law is concerning an issue. For example, consider theorists' disagreement about the connection between the law and morality (which I mentioned in Section I). Theorists often evaluate Hart's and Raz's

propositions, which deny the necessary connection between law and morality, in comparison with Finnis's, Dworkin's, and Wolff's propositions, which affirm the necessary connection between law and morality, to conclude which explanation of the law and its connection with morality is (the most) accurate and adequate. The acceptance of all those theorists' rival propositions about the connection between the law and morality necessitate a contradictory understanding of what the law is, at least concerning that issue, which is unacceptable.[112]

To evaluate the accuracy and adequacy of each other's legal theories, theorists in jurisprudence import methodological guidelines into their comparative and non-comparative examinations. Each theorist believes that an accurate and adequate theory of law should satisfy his imported methodological guidelines. The imported methodological guidelines are a theorist's grounds and reasons to (a) support or (b) criticize the accuracy and adequacy of a legal theory. A theorist (a) supports or (b) criticizes the accuracy and adequacy of a legal theory via demonstrating whether the set of propositions about the law (a) satisfies or (b) fails his imported methodological guidelines. Each theorist believes that the final determination of his comparative or non-comparative examination is legitimate and significant because a legal theory must satisfy his imported methodological guidelines to be (the most) accurate and adequate.

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[112] To be sure, when at least two theorists offer different theories of law concerning an issue, I believe the following is true under the basic intuition mentioned above: (1) a theorist cannot prove each legal theory is (the most) accurate and adequate, but (2) a theorist can prove each legal theory is (to some extent) inaccurate and inadequate. However, neither (1) nor (2) exclude the possibility that a theorist can prove that one legal theory is the most accurate and adequate explanation of the law concerning an issue.

The standard application of methodological guidelines in comparative examinations requires a stricter protocol than in non-comparative examinations. In non-comparative examinations, a theorist can appeal to *any* methodological guideline to evaluate whether a particular legal theory is accurate and adequate. A theorist need not apply the same methodological guideline to examine any other legal theory. In comparative examinations, however, a theorist should appeal to *the same* methodological guideline to evaluate each rival legal theory concerning an issue in order to determine which legal theory is (the most) accurate and adequate. A theorist should apply the same methodological guideline to examine each rival legal theory concerning an issue to accomplish a consistent analysis that provides coherent and cogent determination.

For example, suppose β (a theorist) evaluates two theorists' rival propositions about the law concerning an issue ϕ—say P_1 and P_2—in comparison with each other. Further, suppose β concludes P_1 is (the most) accurate and adequate account of ϕ because (a) P_1 satisfies criterion-*x* and (b) P_2 fails criterion-*y*. β's conclusion is suspicious because the reasons for his support of P_1 and criticism of P_2 are inconsistent. β appeals to a different methodological guideline to evaluate each rival proposition about ϕ. Hence, it is possible that (c) P_2 satisfies criterion-*x* and (d) P_1 fails criterion-*y*. If (a), (b), (c), and (d) are true, β's conclusion is false: P_1 and P_2 are equally accurate and adequate in terms of β's two imported methodological guidelines. Thus, β's conclusion is weak with (c) and (d) as open possibilities. For a coherent and cogent conclusion, β should show that (1) P_1 satisfies

criterion-*x* and criterion-*y* and that (2) P_2 fails the same criteria. β, that is, should appeal to the same methodological guidelines to evaluate each rival proposition about ϕ.

B. What Is Necessary to Achieve the Primary Goal

Unsurprisingly, as a result of the methodology conflict, theorists differ as to what methodology they think theorists should import into their comparative and non-comparative examinations.[113] F2 of the methodology conflict (that is, theorists' commitment to either imperialism or relativism in response different methodologies) creates opposing views about which methodology theorists should import into their examinations. An imperialist believes theorists should import the methodology that he (the imperialist) endorses. A relativist believes theorists should import the methodology that the theorist (who generated the legal theory under examination) endorses. For example, Dworkin (an imperialist) believes all legal theories should satisfy the methodology that he endorses, whereas Hart (a relativist) believes only Dworkin's legal theory must satisfy the methodology that Dworkin endorses. Thus, theorists in jurisprudence today appeal to numerous different methodologies when evaluating to what extent legal theories are accurate and adequate (comparatively or non-comparatively).

To show that theorists appeal to different methodologies to evaluate the accuracy and adequacy of legal theories is not enough to demonstrate that the methodology conflict constitutes a problem for their examinations. Today, many theorists can and do evaluate the accuracy and adequacy of legal theories appealing to different methodologies. They are able to achieve the independent goal of their respective examinations: that is, determine to what

[113] I realize this point may seem obvious or redundant to some readers, but I will explain it below to be sure.

extent a legal theory is accurate and adequate (comparatively or non-comparatively). This fact is unobjectionable. However, the collective goal of theorists' examinations cannot avoid the methodology conflict so easily. For the remainder of this section, I defend the claim that theorists cannot achieve agreement about which legal theory is (the most) accurate and adequate unless they reach agreement about which methodology a legal theory should satisfy to be accurate and adequate in advance. To be clear, I believe the latter agreement is a precondition for the former agreement.

However, theorists that accept pragmatism (who I call *pragmatists*) in response to the methodology conflict appear to reject this claim. Pragmatists operate as if agreement about which methodology a legal theory should satisfy is not a necessary condition to be able to achieve the collective goal. For pragmatists, agreement about which legal theory is (the most) accurate and adequate is sufficient to accomplish the collective goal. Theorists can import different methodologies into their examinations, without sacrificing their ability to achieve the collective goal. To achieve agreement about which legal theory is (the most) accurate and adequate under pragmatism, theorists must find a legal theory that satisfies the different methodologies that they import into their examinations. For example, if T_1 (a legal theory) satisfies each methodology that imperialists and relativists import into their examinations, pragmatists would consider such overlapping results to constitute agreement that T_1 is (the most) accurate and adequate (that is, a common answer to the question "what is law?"). If pragmatists are correct that agreement about which methodology a legal theory should satisfy is not a necessary condition to be able to achieve agreement about which legal

theory is (the most) accurate and adequate, then the methodology conflict cannot prevent theorists from achieving the collective goal as I claimed.

While I acknowledge that theorists importing different methodologies into their examinations could reach overlapping conclusions that a legal theory is (the most) accurate and adequate, pragmatists should not equate it with agreement that the legal theory is (the most) accurate and adequate. Theorists' overlapping determinations that a legal theory is (the most) accurate and adequate are insufficient to achieve the collective goal because theorists will disagree about why the legal theory is (the most) accurate and adequate if they import different methodologies into their examinations. For example, suppose Hart, Finnis, Dworkin, and Leiter each conclude that T_1 (a legal theory) is (the most) accurate and adequate. For pragmatists, agreement that T_1 is (the most) accurate and adequate now exists because T_1 satisfies the imported methodology that each theorist thinks a legal theory should satisfy. However, since Hart, Finnis, Dworkin, and Leiter disagree about which methodology a legal theory should satisfy, they will disagree about why T_1 is (the most) accurate and adequate. For imperialists and relativists, a theorist can provide the correct reasons to support or criticize the accuracy and adequacy of a legal theory only by appealing to the proper methodology. Hart, Finnis, Dworkin, and Leiter will disagree with the reasons that each other provided to determine T_1 is (the most) accurate and adequate because each believes the others did not appeal to the proper methodology. Thus, as long as theorists continue to import different methodologies into their examinations, disagreement about which reasons why a legal theory is (the most) accurate and adequate are correct will underlie overlapping results that a legal theory is (the most) accurate and adequate.

Perhaps I misunderstand how pragmatism responds to the methodology conflict. For pragmatists, part of the response to the methodology conflict probably entails dropping the notion of a single proper methodology that each legal theory must, which is the crux of the disagreement between imperialists and relativists. Instead, pragmatists require each legal theory to satisfy all (or the majority of) the imported methodologies to be (the most) accurate and adequate. Each methodology has equal importance. Thus, pragmatists work toward a common answer to the question "what is law?" by appealing to all methodologies, rather than one proper methodology, to determine which legal theory is (the most) accurate and adequate. To be fair, without the notion of a single proper methodology to import into their examinations, pragmatists can avoid any sense in which some reasons why a legal theory is (the most) accurate and adequate are better or worse than other reasons. All reasons have equal importance. For pragmatists, then, the more reasons to support the accuracy and adequacy of a legal theory the more accurate and adequate the legal theory is.

Nevertheless, I believe different reasons why a legal theory is (the most) accurate and adequate amount to different, and sometimes opposing, understandings of what a legal theory explains about the law accurately and adequately. For example, suppose Hart and Finnis each conclude that Raz's legal theory is (the most) accurate and adequate. To evaluate whether Raz's legal theory is (the most) accurate and adequate, Hart (a relativist) imported Raz's methodology into his examination, which Finnis (an imperialist) imported his methodology into his examination. Each theorist understands Raz's legal theory in terms of the imported methodology that Raz satisfies. Finnis believes Raz to provide a successful evaluative theory of law, whereas Hart believes Raz to provide a successful descriptive

theory of law. Their overlapping conclusions that Raz's legal theory is (the most) accurate and adequate entail conflicting understandings of what Raz explains about the law accurately and adequately: Finnis praises Raz for making the correct moral judgments about the law, and Hart praises Raz for making no moral judgments about the law. Surely, if theorists differ about what a legal theory explains about the law accurately and adequately, then their overlapping conclusions that the legal theory is (the most) accurate and adequate are insufficient means to achieve the collective goal (that is, to constitute a common answer to the question "what is law?").

To conclude, I state the necessary conditions that theorists must fulfill to engage in meaningful debate about which legal theory is (the most) accurate and adequate and achieve the collective goal. I illustrated above that theorists must agree about (A1) which legal theory is (the most) accurate and adequate and (A2) why the legal theory is (the most) accurate and adequate. If theorists disagree about A1or A2, they will fail to achieve the collective goal. I contend that theorists can achieve agreement about A1 and A2 by fulfilling the following two necessary conditions.

The *first condition* (C1) is agreement about which methodology (or methodologies) theorists should import into their comparative and non-comparative examinations to evaluate the accuracy and adequacy of legal theories. C1 is necessary to make agreement about A2 possible and agreement about A1 more likely. Unless theorists agree about which methodology each legal theory must satisfy, they cannot agree about the reasons why a legal theory is (the most) accurate and adequate. With agreement about which methodology theorists should import into their examinations, theorists will engage in meaningful debate

about which legal theory is (the most) accurate and adequate and work more successfully towards achieving the collective goal. To put more simply, by fulfilling C1, theorists will no longer talk past each other. The *second condition* (C2) is agreement about which legal theory is (the most) accurate and adequate according to the methodology (or each methodology) that theorists agreed to import into their comparative and non-comparative examinations. In addition to C1, C2 is necessary to achieve agreement about A1 and A2 in fact. Even if theorists fulfill C1, they can fail to achieve the collective goal. Theorists could disagree about whether (and to what extent) a legal theory satisfies the entire set of methodological guidelines that they agreed to import into their examination, which would entail some sort of disagreement about either A1 or A2.

Today, C1 remains unfulfilled in jurisprudence because theorists disagree about S2. Without agreement about which methodology each legal theory should satisfy, the current debate about A1 seem meaningless because theorists cannot agree about A2. That is not to suggest that current conversations possess no value. Nevertheless, if theorists ever want to end the long and continuing history of diverse, strange, and paradoxical answers to the question "what is law?" with a common answer, they should take the problem that the methodology conflict constitutes for the collective goal of their examinations seriously. The methodology conflict prevents theorists from achieving the collective goal and, thereby, the primary goal of jurisprudence. Thus, I believe that theorists must resolve the methodology conflict first.

V. CONCLUSION: HOW TO RESOLVE THE METHODOLOGY CONFLICT

Heretofore, I explained how and why Hart, Raz, Finnis, Dworkin, Leiter, and other theorists talk past each other in the debate about S1 without an agreement about S2. I argued that theorists cannot agree about (A1) which legal theory is (the most) accurate and adequate and (A2) why the legal theory is (the most) accurate and adequate until they resolve their disagreement about S2. In this section, I consider how theorists should resolve the methodology conflict. Today, theorists that work to reach agreement about S2 as their primary or secondary concern usually attempt to resolve the methodology conflict with two familiar approaches: namely, either imperialism or relativism. I argue that a synthesis of these two approaches—one that combines their strengths and eliminates their weaknesses—provides a solution to the methodology conflict that will allow theorists to achieve the primary goal of jurisprudence. In Section V.A, I identify some central strengths and weaknesses of imperialism and relativism. In Section V.B, I offer a reasonable four-step examination process that allows theorists to engage in meaningful debate about S1 and S2 and work more successfully towards achieving the collective goal of their examinations.

A. Comments on the Two Current Approaches

For some theorists, imperialism is the proper approach to resolve the methodology conflict. Theorists work to reach agreement about which methodology all legal theories should satisfy to be (the most) accurate and adequate. The proper methodology designates what is important and necessary to explain about the law in order to further our understanding of what the law is. For imperialists, theorists should import the proper methodology into their examinations to determine which single legal theory is (the most)

accurate and adequate. If a theorist imports a different methodology into his examinations, he will in some way fail to test legal theories for what is important and necessary to explain about the law. Since several imperialists already disagree about which methodology is the proper methodology for jurisprudence, achieving such agreement among theorists is a difficult task to complete today.

Nevertheless, despite the difficult task imperialism poses, I suspect that theorists accept imperialism to resolve the methodology conflict because they believe jurisprudence should deliver a particular outcome: namely, a single "correct," "true," or "fruitful" legal theory that furthers our understanding of what the law is. Imperialists probably want this outcome from jurisprudence due to the basic intuition that a single accurate and adequate explanation exists for each phenomenon or set of phenomena, such as the law. For imperialists, the collective goal is to achieve agreement about which one legal theory is (the most) accurate and adequate according to the proper methodology that theorists should import into their examinations. Because theorists appeal to the same methodology to evaluate all legal theories under imperialism, they are more likely to achieve agreement about which one legal theory is (the most) accurate and adequate *in the sense that* a single "correct," "true," or "fruitful" explanation exists for the law.[114] I acknowledge that requiring theorists to satisfy a common methodology to produce a single accurate and adequate theory of law can be a reasonable *prospective* approach to achieve a common answer to the question "what is law?".

[114] Cf. Bix, *Jurisprudence*, 28.

However, to require that existing legal theories satisfy a common methodology—a methodology the theorists (who generated the legal theories under examination) likely do not endorse—is an unfair retrospective approach to achieve the collective goal. For example, Dworkin (an imperialist) imports one of his checking-points (which I explained in Section II.B) to serve as one proper methodological guideline to evaluate the accuracy and adequacy of all legal theories.[115] Dworkin's checking-point requires all theorists to account for the theoretical disagreements about law that judges and lawyers actually do have. Dworkin shows that legal positivist theories, which, for Dworkin, includes legal theories authored by Hart and Raz, cannot and do not explain the theoretical disagreements about law that judges and lawyers actually do have. Dworkin concludes that Hart and Raz fail his methodological guideline and thus provide inaccurate and inadequate accounts of the law to some extent. Hart and Raz do not commit to satisfy the checking-point Dworkin endorses. Dworkin (as an imperialist) believes all theorists should explain this particular fact or data about legal phenomena to provide an accurate and adequate account of the law, regardless of whether Hart, Raz, or other theorists in fact endorse the same methodological guideline. I believe Dworkin's conclusion that Hart's and Raz's legal theories is unfair because Dworkin held Hart and Raz accountable to a methodological guideline that they do not commit to satisfy.[116]

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[115] See Dworkin, *Law's Empire*, 3-47.

[116] I admit that appealing to a methodological guideline that a theorist does not commit to satisfy can be appropriate or even necessary in certain circumstances. However, before appealing to a methodological guideline that a theorist does not commit to satisfy, I will contend below that requiring the theorist (who constructed the legal theory under examination) to satisfy the methodology he endorses *first* is a more fair approach to determine to what extent his legal theory is accurate and adequate (comparatively or non-comparatively).

Moreover, in spite of its weaknesses, imperialism possesses a significant strength: namely, imperialists usually question whether a methodology *can be* satisfied *in the sense that* it is theoretically possible for a theorist to provide a legal theory that satisfies the methodology he endorses successfully. For example, Finnis and Dworkin—albeit for different reasons—deny that Hart and Raz *can* provide a legal theory that satisfies their methodological commitment to a purely descriptive analysis-method. Finnis and Dworkin believe that Hart and Raz fails and will always fail provide a legal theory that satisfies this methodological guideline. Hart and Raz's methodological commitment to a morally neutral analysis of the law entails believing that generating a set of propositions does not necessarily require moral evaluation or justification of the law. However, Finnis and Dworkin believe that generating a set of propositions about the law necessarily requires moral evaluation or justification of the law.[117] If Finnis and Dworkin are correct that it is theoretically impossible for Hart and Raz to provide a legal theory that satisfies this methodological guideline successfully, their legal theories could not explain what the law is accurately and adequately in the manner that Hart and Raz claim. For that reason, I believe this form of questioning should be a legitimate and an important part of theorists' efforts to determine to what extent a legal theory is accurate and adequate (comparatively or non-comparatively). Theorists have no reason to trust that theorists can satisfy the methodology that each endorses.

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[117] To a large extent, this dispute about whether an analysis of the law necessarily involves moral evaluation or justification between Hart and Raz versus Finnis and Dworkin rests on other methodological guidelines—namely, their respective starting-points and participant-perspectives—that those theorists believe should be satisfied to provide a legal theory that is an accurate and adequate account of the law. For further explanation, see Dickson, *Evaluation and Legal Theory*, 7-9.

In contrast to imperialism, some theorists believe relativism is the proper approach to resolve the methodology conflict. Theorists work to reach agreement about which methodology each legal theory should satisfy to be (the most) accurate and adequate as well as how different methodologies are compatible or continuous with each other. Theorists should import the methodology that the theorist (who generated the legal theory under examination) endorses into their examinations to determine to what extent a legal theory is accurate and adequate (comparatively or non-comparatively). For relativists, each theorist is accountable to the methodological guidelines that he commits to satisfy. Unfortunately, relativists usually blindly accept that each methodology *can be* satisfied successfully, which is mistake for the reasons I expressed above. Nonetheless, I believe that requiring each theorist to satisfy the methodology he endorses is a fair retrospective and prospective approach to evaluate legal theories and achieve the collective goal.

I suspect that theorists accept relativism to resolve the methodology conflict because they believe jurisprudence should deliver the broadest possible understanding of what the law is. Relativists want to study and explain the law in as many diverse ways as possible to broaden our understanding of what the law is. The broad and diverse understanding of law that relativism offers is more appealing than the narrow and singular understanding of law that imperialism offers. Unlike other phenomena (such as gravity or the creation of the universe), the law is a social set of phenomena that involves historical, anthropological, moral, political, and economic questions in addition to legal issues. To answer all these questions accurately and adequately in a single legal theory according to a single methodology seems unlikely, which I think make relativism the more reasonable approach.

For relativists, the collective goal is to achieve agreement about which legal theories are (the most) accurate and adequate according to their relative methodologies that theorists should import into their examinations. Because theorists appeal to different methodologies to evaluate different legal theories under relativism, they cannot achieve agreement about which one legal theory is (the most) accurate and adequate *in the sense that* a single "correct," "true," or "fruitful" explanation exists for the law. To imperialists, this is a significant flaw because relativism appears to be unable to achieve a common answer to the question "what is law?" However, I believe theorists can achieve the primary goal under relativism. Theorists are able to affirm or deny whether a legal theory is accurate and adequate, or more accurate and adequate than another legal theory, relative to a particular methodology.[118] Agreement about which legal theories are (the most) accurate and adequate according to their relative methodologies—as long as those legal theories are compatible or continuous with each other—is sufficient to constitute a common answer to the question "what is law?".

Furthermore, under relativism, the amount of theorists that endorse a methodology determines whether commentators should use comparative or non-comparative examination to evaluate the accuracy and adequacy of legal theories most effectively. If one theorist endorses M_3 (a methodology), commentators should use a non-comparative examination to evaluate whether his legal theory is accurate and adequate according to M_3. However, if multiple theorists endorse M_3, and if each theorist generated an individual theory of law,

[118] Cf. Bix, *Jurisprudence*, 28.

commentators should use a comparative examination to evaluate which legal theory is (the most) accurate and adequate according to M_3.

However, relativism offers no explicit standard of acceptable methodological difference to determine the proper form of examination. For example, due to the numerous methodological differences between Dworkin and himself, Hart (a relativist) believes that Dworkin and his legal theories do not require comparative examination to determine which legal theory is (the most) account and adequate. In contrast to Dworkin, Hart appears to believe that Raz's and his legal theories do require comparative examination. Yet, Hart and Raz have a subtle methodological difference concerning their starting-points: Hart believes that the various rules of a legal system should be explanatory primary, whereas Raz believes that the various reasons for actions that the various norms of a legal system provide should be explanatory primary. Hart was probably aware of this methodological difference, but apparently it was not enough for Hart to understand Raz as offering a differing rather than competing legal theory. For theorists to work successfully towards achieving the collective goal under relativism, a standard that specifies to what extent at least two theorists can endorse different methodological guidelines and yet still require comparative examination (rather than non-comparative examination) to evaluate which legal theory is (the most) accurate and adequate. I believe that requiring a comparative examination if at least two theorists endorse identical sets of methodological guidelines is the standard of acceptable methodological difference that is most consistent with relativism.

B. A New Approach

In conclusion, I will offer a new approach that allows theorists to engage in meaningful debate about S1 and S2 and work more successfully towards achieving the collective goal. Previously, I explained in Section IV.B that theorists must fulfill C1, which, in effect, resolves the methodology conflict, if theorists are to be able to agree about (A1) which legal theory is (the most) accurate and adequate and (A2) why the legal theory is (the most) accurate and adequate. Then, I explained above the strengths and weaknesses of the two current approaches to resolve the methodology conflict. The most pressing question now is the following: how should theorists fulfill C1?

I answer in the spirit of relativism. I believe that theorists should import the methodology that the theorist (who generated the legal theory under examination) endorses into their comparative and non-comparative examinations. However, fulfilling C1 by accepting relativism in its current form does not ensure that theorists can and will agree about A1 and A2 because relativism has weaknesses that affect theorists' ability to agree about A1 and A2: namely, it does not (a) require identical methodologies for comparative examinations and (b) question whether methodologies can be satisfied. To be sure, the latter is a procedure that imperialism accomplishes extremely well. The approach that I offer must do both. In addition, relativism requires that theorists compare successful legal theories to determine whether they contradict each other. The acceptance of legal theories contradict each other—despite their successfulness—would result in a contradictory understanding of the law, which is unacceptable.

Accordingly, I offer a new retrospective and prospective four-step examination process that provides a strategy for how theorists should resolve the methodology conflict and proceed towards the primary goal of jurisprudence. The *first step* is to determine whether any other theorists commit to satisfy *the identical* methodology that the theorist (whose legal theory is the primary object under examination) endorses. The *second step* is to determine whether the methodology the theorist (whose legal theory is the primary object under examination) commits to satisfy *can be* satisfied. The *third step* is to determine to what extent a legal theory is (the most) accurate and adequate according to the methodology that the theorist (who generated legal theory under examination) endorses (comparatively or non-comparatively). The *fourth step* is to determine whether any legal theories considered to be (the most) accurate and adequate according to their respective methodologies are compatible or continuous with each other or contradict with each other.

BIBLIOGRAPHY

Austin, John. *The Province of Jurisprudence Determined*. London: Weidenfeld and Nicolson, 1954.

Bix, Brian. *Jurisprudence: Theory and Context.* Durham: Carolina Academic Press, 2004.

Coleman, Jules. "Methodology." In *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules Coleman and Scott Sharpiro, 311-351. Oxford: Oxford University Press, 2002.

————. *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory*. Oxford: Oxford University Press, 2001.

Dickson, Julie. "Methodology in Jurisprudence: A Critical Survey." *Legal Theory* 10 (2004): 117-156.

————. *Evaluation and Legal Theory*. Oxford-Portland: Hart Publishing, 2001.

Dworkin, Ronald. *Law's Empire*. Cambridge: Harvard University Press, 1986.

————. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.

Finnis, John. "Law and What I Truly Should Decide." *The American Journal of Jurisprudence* 48 (2003): 107-129.

————. "On the Incoherence of Legal Positivism." *Notre Dame Law Review* 75 (2000): 1597-1611.

————. *Natural Law and Natural Rights.* Oxford: Clarendon Press, 1980.

Giudice, Michael. "Ways of Understanding Diversity among Theories of Law." *Law and Philosophy* 24 (2005): 509-545.

Gray, John. *The Nature and Sources of Law*. New York: Columbia University Press, 1909.

Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1994.

Holmes, Oliver. *Collected Legal Papers*. New York: Harcourt, Brace, and Howe, 1920.

Kelsen, Hans. *General Theory of Law and State*. New York: Russell and Russell, 1961.

Leiter, Brian. "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence." *The American Journal of Jurisprudence* 48 (2003): 17-51.

————. "Realism, Hard Positivism, and Conceptual Analysis." *Legal Theory* 4 (1998) 533-547.

————. "Rethinking Legal Realism: Toward a Naturalized Jurisprudence." *Texas Law Review* 76 (1997): 267-315.

Llewellyn, Karl. *The Bramble Bush: On Our Law and Its Study*. New York: Oceana Publications, 1951.

Perry, Stephen. "Hart's Methodological Positivism." *Legal Theory* 48 (2003): 427-467.

————. "Interpretation and Methodology in Legal Theory." In *Law and Interpretation: Essays in Legal Philosophy*, edited by Andrei Marmor, 97-135. Oxford: Clarendon Press, 1995.

Postema, Gerald. "Jurisprudence as Practical Philosophy." *Legal Theory* 4 (1998): 329-357.

Raz, Joseph. "Can There Be a Theory of Law?" In *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson, 24-342. Malden: Blackwell Publishing, 2005.

————. *Practical Reason and Norms*. Oxford: Oxford University Press, 1999.

————. "Two Views of the Nature of the Theory of Law: A Partial Comparison." *Legal Theory* 4 (1998): 249-282.

————. "Intention and Interpretation." In *The Autonomy of Law*, edited by Robert George, 249-286. Oxford: Clarendon Press, 1996.

————. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Oxford: Oxford University Press, 1994.

————. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 1979.

Simmonds, N.E. "Bringing the Outside In." *Oxford Journal of Legal Studies* 13 (1993): 147-165.

Wolff, Robert. *In Defense of Anarchy*. Berkeley: University of California Press, 1998.

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